No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

—v.—

GLEN BILLING, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT MILTON PFEIFFER

RUSSEL H. BEATIE
Counsel of Record
BEATIE AND OSBORN LLP
521 Fifth Avenue
New York, New York 10175
(212) 888-9000

Attorneys for Respondent Milton Pfeiffer

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Second Circuit properly formulate and apply the law of immunity to the Robinson- Patman Act commercial bribery claim stated in the *Pfeiffer* Complaint?

Does the commercial bribery claim under section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), need to be restated in order to eliminate inextricable intertwining of lawful conduct and illegal conduct pleaded in the Complaint?

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STATEMENT OF THE CASE

In 1998 and 1999 the Petitioner investment banking/broker-dealer firms[1] ("investment banking firms" or investment banking Petitioners") and the Petitioner institutional investor firms[2] ("investor firms" or "investor Petitioners") found themselves in an extraordinary but not unique hot issue initial public offering ("IPO") market, devoted primarily to green technology companies. They took advantage of this by adopting a secret plan by which they would maximize their profits at the expense of the unknowing investing public.

Although the hot issue market virtually guaranteed a substantial premium on an IPO for any technology company, the investment banking Petitioners took steps to insure that the premium would be as large as possible by violating the antitrust laws. Their plan was not new. Similar abuses of hot issue IPO markets had taken place in the past, i.e., 1963 and 1984.[3] *See* Pet'rs Br. 12-13.

The complaint filed by the Securities and Exchange Commission ("SEC") against Credit Suisse First Boston Corporation ("CSFB"), and the complaints against other firms (*see* Pet'rs Br. 14) show that the allegations in the

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[1] Credit Suisse First Boston Corp., The Goldman Sachs Group, Inc., Lehman Brothers, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Morgan Stanley Dean Witter & Co., BancBoston Robertson, Stephens, Inc., and Salomon Smith Barney, Inc.

[2] Fidelity Distributors Corporation, Fidelity Brokerage Services LLC, Fidelity Investments Institutional Services Co., Janus Capital Corporation, Coamerica, Inc. d/b/a Munder Capital Management, Van Wagoner Capital Management, Inc., and Van Wagoner Funds, Inc.

[3] These reports from three separate hot issue IPO markets may have efficiently identified the misconduct; but they and their aftermath showed the Securities and Exchange Commission to be incapable of halting or deterring the same misconduct.

Complaint filed by Respondent Milton Pfeiffer ("Pfeiffer" or "Respondent") describing extraordinary misconduct in the aftermarket for the hot issue IPO's were not made "on information and belief" or on the basis of "inferences" from sparse facts. The CSFB complaint, with its detailed allegations, charts, and descriptions of specific financial transactions, achieves a level of specificity far beyond that necessary to satisfy Rule 9 of the Federal Rules of Civil Procedure.

Prior to the effective date of each hot issue IPO, the investor Petitioners and the investment banking Petitioners agreed that the investor firms would "on command" buy large blocks of the IPO stock in the aftermarket in order to drive the price of the IPO stock up, and not sell the shares until they received the "green light" from the investment banking Petitioners, when the stock had peaked and had begun its downward spiral. These transactions violated statutory provisions of the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Exchange Act"). The 1933 Act, at section 17(a) provides:

> It shall be unlawful for any person in the offer or sale of any securities . . .
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). The 1934 Exchange Act, at section 9(a)(2) states that it shall be unlawful for any person:

> To effect, alone or with one or more other persons, a series of transactions . . . creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

15 U.S.C. § 78i(a)(2).

The investment banking Petitioners arranged for the investor Petitioners and others to make large purchases in the aftermarket for the IPO issues "upon command" at prices greater than the IPO price, a direct violation of section 9(a)(6) of the 1934 Exchange Act, the stabilization statute. The stabilization statute makes it unlawful for any person:

> To effect . . . any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security *in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.*

15 U.S.C. § 78i(a)(6) (emphasis added). This statute allowed the SEC discretionary rule-making power, a circumstance Petitioners were able to abuse. For example, could the Petitioners "stabilize" six months, one year, or two years after the effective date of the IPO?

In addition, the investment banking firms moved their analyst departments to the corporate finance or investment banking departments. There, the analysts were controlled by the personnel in charge of the hot issue IPOs.

In spite of the fact that in almost all cases the hot issue IPO companies had very limited analyzable or reportable business operations, customers, functional or marketable products, and records of sales or profits, the analysts, working under the control of the investment banking personnel, issued "strong buy," "buy," "outperform the market," and "hold" recommendations for the IPO hot issues in violation of section 17(a) of the 1933 Act and section 10(b) of the 1934 Exchange Act. These recommendations had the effect of driving the market price for the IPO hot issues higher. The statements made in the recommendations were false and known to be false, were made without any basis whatsoever in fact, and violated the following securities laws: 1933 Act, § 17(a); 15 U.S.C. § 77q(a); Securities 1934 Exchange Act, § 9(a)(4); 15 U.S.C. § 78(a)(4). Section 9(a)(4) of the 1934 Exchange Act makes it unlawful for any person:

> To make . . . any statement which was at the time and in the light of the circumstances under which it was made, false or misleading.

15 U.S.C. § 78i(a)(4). In the operation of the national securities markets, the SEC could not "regulate" these practices by making them legal or lawful, nor could the SEC require the conduct the statutes make unlawful.

Prior to an IPO, the investment banking firms and the investor firms agreed that the investor firms would transfer one- third of their IPO profits to the investment banking firms. Taking advantage of directions from the investment banking firms, who gave them a cue for the proper time to sell the hot issue IPO securities, i.e., when the market price for the IPO security could no longer be sustained at its inflated level, the investor firms sold the IPO securities and collected extraordinary profits. Pursuant to their agreement with the investment banking Petitioners, who knew the prices at which the

IPO hot issue securities had been bought and sold, and could, therefore, calculate the profits realized by the investor firms (J.A. 69, ¶¶ 26-45), the investor firms executed a series of transactions in unrelated non-IPO hot issue securities for their institutional investor clients. The ordinary commission on a transaction of this sort during this period would have been five or six cents per share. J.A. 73-74, ¶ 46. In fact, however, the investor firms paid as much as a dollar per share as a commission on the sale or purchase of these unrelated securities. J.A. 74-76, ¶¶ 50-52. These transactions continued until the syndicate managers of the investment banking Petitioners determined that they had received sufficient excessive commissions to pay them their share of the investor Petitioners' profits on the purchase and sale of the IPO hot issue securities. Finally, splitting profits from trading in a manipulated security is both a civil and a criminal violation of the 1934 Exchange Act. *United States v. Cusimano*, 123 F.3d 83, 87-88 (2d Cir. 1997); *United States v. Libera*, 989 F.2d 596, 599-600 (2d Cir. 1993). The SEC cannot make splitting profits from manipulation lawful.

The recitation of these transactions and the payment of the profits realized from them may sound like a chapter from *Alice in Wonderland*. For that reason, we have included in the Joint Appendix a copy of the complaint investigated and filed by the SEC against CSFB approximately one year after the *Pfeiffer* Complaint with its strikingly similar allegations had been filed in the United States District Court for the Southern District of New York. J.A. 63-85. The SEC was able to plead specific details by virtue of its practice of subpoenaing records and testimony under an Order of Investigation, which allows it to conduct discovery before it files a complaint. The payments made by CSFB to its investment banking/broker-dealer clients are shown in box charts appear-

ing in the Joint Appendix at pages 73 through 82, paragraphs 46 through 66. Pfeiffer in his Complaint asserts that the payments made by excessive commissions constituted commercial bribery in violation of section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c).

When misconduct by the investment banking Petitioners became sufficiently known to be pleaded by private plaintiffs seeking recovery of the losses they sustained as a result of the extraordinary greed of the investment banking firms, more than three hundred securities fraud cases and two separate antitrust cases were filed. The antitrust and securities cases were grouped according to the nature of their claims, assigned in each case to a single judge for prosecution, and consolidated for pretrial proceedings. The securities cases were assigned to United States District Judge Shira Scheindlin; the two antitrust cases were assigned to United States District Judge William H. Pauley, III.

In the securities cases the defendants moved to dismiss, and their motion was denied. The securities plaintiffs then moved for class certification under Rule 23 of the Federal Rules of Civil Procedure, and their motion was granted. The defendants in the securities cases, Petitioners here also, appealed certification of the class to the United States Court of Appeals for the Second Circuit. The Second Circuit reversed and remanded without leave to replead, *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), and plaintiffs moved for rehearing *en banc*.

In the antitrust cases assigned to Judge Pauley, the Petitioners moved to dismiss on two grounds, immunity from the antitrust laws and lack of antitrust standing. Judge Pauley granted the motion to dismiss on the ground of immunity and did not consider the arguments on standing. *In re Initial Pub. Offering Antitrust Litig.*,

287 F.Supp.2d 497 (S.D.N.Y. 2003). The antitrust Respondents appealed to the Second Circuit, which vacated the decision by the District Court and remanded the case for further proceedings consistent with its opinion. *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 164 (2d Cir. 2005), *cert. granted*, 127 S.Ct. 762 (2006) (A copy of the decision is contained in Petitioners' certiorari petition. Cert. Pet. at 57a.) The investment banking Petitioners and institustional investor Petitioners moved for rehearing *en banc*. When that motion was denied, they applied to this Court for certiorari, which was granted.

From the time the Petitioners filed the first motion in this case, they have persistently and, given the numerous complaints on our part, intentionally misrepresented the claims in the *Pfeiffer* Complaint. Pfeiffer seeks recovery for misconduct in the hot issue IPO aftermarket in the form of commercial bribery violating section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c). The bribes were the excessive commissions, which represented the agreed upon percentage of the profits on trading in the IPO securities. Pfeiffer does not make claims involving underwriting activities in our Complaint, nor do we even mention "roadshows," "building the book," "indications of interest," "meetings of officers," or other practices representing, we are told, the lifeblood of the United States capital markets. These buzz words do not appear in the *Pfeiffer* Complaint. The *Billing* Complaint, presenting the Sherman Act claim, on the contrary, emphasizes underwriting practices as major parts of its claims.

SUMMARY OF ARGUMENT

This case involves the issue presented when the antitrust laws and a regulatory statute overlap, here the issue of immunity from the antitrust laws for IPO transactions in the national securities markets that are regulated by the Securities Act of 1933 and the Securities Exchange Act of 1934. The various statutes must be construed to determine whether or not repeal of the antitrust laws on the facts in the *Pfeiffer* case must be implied in order to make the securities laws work; and if repeal of the antitrust laws must be implied, the minimum amount necessary for that purpose.

Petitioners do not seek the minimum implied repeal. Instead, they seek a general gaol delivery in which the antitrust laws are fully repealed, the Petitioners keep their monstrous unlawful profits, and they escape without a scratch. Of course, Petitioners also oppose any amendment of the pleadings that would allow the antitrust actions to go forward. Pet'rs Br. 49 n. 6.

In order to determine that implied repeal of the antitrust laws is required under the present circumstances, we must find a "clear repugnancy between the antitrust laws and the regulatory system" governing the national securities markets, *U.S. v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719-20 (1975), or a "potential specific conflict between the antitrust laws and a regulatory regime," *Billing*, 426 F.3d at 164. In the *Pfeiffer* Complaint, Respondent asserts only a claim for commercial bribery that violates section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c). Because the issue came to this Court procedurally in a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court should determine whether the lower courts properly applied that rule. The Court of Appeals,

searching for a "potential conflict" between the legal elements necessary to establish a claim for commercial bribery and the IPO regulatory framework, proceeded properly. The District Court, as the brief for the United States contends, did not. Instead of evaluating the elements of the claim, the District Court wrote an unfocused essay covering the background, motives, and means pleaded in the Complaint. The Court ignored extraordinary misconduct by the investment banking Petitioners and the investor Petitioners.

The elements of a claim for commercial bribery (payment of a bribe across the buyer-seller line, a fiduciary relationship, receipt of personal benefit, and secrecy of the bribe, *see Harris v. Duty Free Shoppers Ltd. P'ship*, 940 F.2d 1272, 1274 (9th Cir. 1991); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 993 (4th Cir. 1990); *Grace v. E.J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976), do not demonstrate any "clear repugnancy between the antitrust laws and the regulatory system," or a "potential specific conflict." Other factors pleaded in the *Pfeiffer* Complaint, including false analyst reports, and prearranged or directed transactions in the aftermarket, i.e., tie-in and laddering transactions, merely explain the motives of the parties to the transactions at issue and the means by which they carried out their unlawful scheme, e.g., accumulation and division of illegal profits from manipulation. Even if the fraudulent analyst reports, the prearranged or directed transactions, or the exorbitant commissions, were deemed by the Court to be necessary elements of a claim for commercial bribery that violates the Robinson-Patman Act, they do not create the necessary "clear repugnancy" between the Robinson-Patman Act and the federal securities laws because they are unlawful under the congressional statutory scheme for both. And if they are deemed by the Court to be necessary parts of the

antitrust violations alleged here, they present no potential conflict with the securities laws because they are also unlawful conduct under specific provisions of the federal securities laws, i.e., the 1933 Act and the 1934 Exchange Act. The SEC can never by rule or regulation create a "potential conflict" with the antitrust laws by making lawful, securities practices that are unlawful by statute.

The Court should bear in mind that underwriting practices emphasized in the *Billing* Complaint (the other antitrust complaint) and the *amicus* brief of the United States, are not pleaded or even mentioned and are completely unnecessary to the *Pfeiffer* Complaint. Hence, the lengthy discussion of underwriting and indispensable practices like "roadshows," "building the book," "indications of interest," conversations with customers, and meetings of officers, etc., in Petitioners' brief should play no role in the assessment of the *Pfeiffer* Complaint.

ARGUMENT

PFEIFFER'S CLAIM FOR COMMERCIAL BRIBERY UNDER SECTION 2(C) OF THE ROBINSON-PATMAN ACT, 15 U.S.C. § 13(c), PRESENTS NO POTENTIAL CONFLICT WITH THE REGULATORY SCHEME OF THE SECURITIES LAWS AND NO OTHER BASIS FOR IMPLIED REPEAL OF THE ANTITRUST LAWS

No matter what Petitioners or our co-Respondent say in their briefs, this is an aftermarket case, not an underwriter case. Petitioners argue that they should not "pay the piper" for their greedy conduct in the aftermarket trading for the hot issue IPOs; nor should they disgorge their unlawful profits to the public investors victimized by their scheme. Petitioners simply cannot with a

straight face deny unlawful conduct. The issue before the Court, therefore, is the existence of rights and remedies for the investing public against the investment banking and investor Petitioners, specifically their exposure to treble damages under the antitrust laws.

The antitrust laws are more important in the circumstances at hand than they would normally be. Petitioners repeatedly claim in their brief that the antitrust actions have no significance because the antitrust claimants will be compensated by the IPO securities class action in which they are participants. Pet'rs Br. 7, 33. True if . . . but only if . . . the Court of Appeals had not reversed the class certification for the securities plaintiffs and remanded without leave to replead the class allegations on the ground that no valid class could be established. *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 42, 45 (2d Cir. 2006). Without a class the securities plaintiffs have no claim they can reasonably prosecute to judgment or settlement because the individual claims are too small to justify the expense. That leaves the participants in the hot issue IPO market with no reasonable way to assert their claims except in the antitrust class action. Moreover, even if those claims are pursued in some form, in spite of Petitioners' undeniable malfeasance, they will not be liable for punitive damages, *Manufacturers Hanover Trust Co. v. Drysdale Sec. Corp.*, 801 F.2d 13, 29 (2d Cir. 1986), or for their fraud.

The private litigant is important to the enforcement of the federal securities laws and the federal antitrust laws.[4]

[4] Petitioners equate use of the antitrust laws to abuse of the federal securities laws. All restrictions passed by the tort reform proponents were intended to halt abuses of the federal securities laws. The purpose of the legislation that modified the federal securities laws was to halt abusive practices by securities plaintiffs, not to preclude or reduce claims under the antitrust laws.

Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988) ("private cause of action exists for a violation of § 10(b) and Rule 10b-5, and constitutes an essential tool for enforcement of the 1934 Act's requirements"); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 n.16 (1976); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.") (emphasis in original); *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329 (1955); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977).

POINT I

THE SECOND CIRCUIT PROPERLY APPLIED THE REQUIREMENTS FOR IMPLIED REPEAL OF THE ANTITRUST LAWS

This case requires an assessment of two bodies of statutory law to determine whether immunity from the antitrust laws should be implied for the Petitioners. When construing a congressional statute, a court should look first to the language of the statute to determine whether or not the intent of Congress is clear on its face. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Hernandez v. Ashcroft*, 345 F.3d 824, 838 (9th Cir. 2003). If the intent is not clear, and in the present case it is not, the court must seek congressional intent by a variety of factors relevant to the legislation. *See, e.g., Robinson*, 519 U.S. at 341-46; *Dobrek v. Phelan*, 419 F.3d 259, 264-67 (3d Cir. 2005). This was the course fol-

lowed by the United States Court of Appeals for the Second Circuit. Pet. App. 33a-34a; 53a-56a; 57a. The fundamental rules for finding "implied immunity" have been articulated on numerous occasions. As this Court explained in *National Gerimedical Hosp. and Gerentology Ctr. v. Blue Cross*, 452 U.S. 378, 387 (1981):

> [T]his Court has faced similar claims of antitrust immunity in the context of various regulated industries. The general principles applicable to such claims are well established. The antitrust laws represent a "fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218, 86 S.Ct. 781, 784, 15 L.Ed.2d 364 (1966); see *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-399, 98 S.Ct. 1123, 1129, 55 L.Ed.2d 364 (1978). "Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-720, 95 S.Ct. 2427, 2442-2443, 45 L.Ed.2d 486 (1975); see *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682, 95 S.Ct. 2598, 2611, 45 L.Ed.2d 463 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351, 83 S.Ct. 1715, 1734, 10 L.Ed.2d 915 (1963).

After citing these fundamental rules, which can be found in the three landmark decisions involving the antitrust laws and the national securities markets, *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963), *Gordon*, 422 U.S. 659, *NASD*, 422 U.S. 694, this Court then determined that the guiding factor should be congressional intent, as the Second Circuit specified in the decision at hand:

> To be sure, where Congress did intend to repeal the antitrust laws, that intent governs, *United States v. National Association of Securities Dealers, supra*; *Gordon v. New York Stock Exch., Inc., supra*, but this intent must be clear.

Gerimedical, 452 U.S. at 389. According to this decision, Congressional intent governs the finding of implied antitrust immunity in a case involving the national securities markets and the antitrust laws. Continuing, the Court said:

> Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry. *E.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-375, 93 S.Ct. 1022, 1027-1028, 35 L.Ed.2d 359 (1973); *United States v. Radio Corp. of America*, 358 U.S. 334, 346, 79 S.Ct. 457, 464, 3 L.Ed.2d 354 (1959).

Gerimedical, 452 U.S. at 389. The United States Court of Appeals for the Second Circuit applied a specific, two-part test to the question of immunity: first, "the rare regulatory scheme pervasive enough to indicate that Congress forswore the paradigm of competition." *Billing*, 426 F.3d at 164 (citing *NASD*, 422 U.S. at 730-33). The second and far more frequent test, according to the Court of Appeals:

> . . . can arise only when there is a *potential specific conflict between the antitrust laws and a regulatory regime*.

Billing, 426 F.3d at 164 (citing *Northeastern Tel. Co. v. American Tel. and Tel. Co.*, 651 F.2d 76, 82 (2d Cir. 1981); *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 27-28 (2d Cir. 1985)) (emphasis supplied). To identify

the conflict that invokes immunity under this test, the court must

> . . . determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed. That determination is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal.

Billing, 426 F.3d at 164 (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 371-76; *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 333; *Northeastern Tel. Co.*, 651 F.2d at 83-84.)

POINT II

THE ELEMENTS OF COMMERCIAL BRIBERY UNDER SECTION 2(C) OF THE ROBINSON-PATMAN ACT PROVIDE NO BASIS FOR IMPLIED REPEAL OF THE ANTITRUST LAWS

Under the Federal Rules a complaint need contain no more than a short, plain statement of the claim that demonstrates the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The burden on a plaintiff alleging federal antitrust violations is no greater than the burden faced by a plaintiff alleging any other cause of action not covered by the heightened pleading requirements of Rule 9. *See George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., Inc.*, 554 F.2d 551, 554 (2d Cir. 1977) ("a short plain statement of a claim for relief which gives notice to the opposing party is all that is

necessary in antitrust cases"); *Nagler v. Admiral Corp.*, 248 F.2d 319, 322-23 (2d Cir. 1957); *Barr v. Dramatists Guild, Inc.*, 573 F.Supp. 555, 558 (S.D.N.Y. 1983); *Newburger, Loeb & Co. v. Gross*, 365 F.Supp. 1364, 1367-68 (S.D.N.Y. 1973); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 995 (11th Cir. 1983).

In order to assess the relationship of the commercial bribery provision and the national securities markets in a motion to dismiss under Rule 12(b)(6) on the grounds of immunity from the antitrust laws, the Court should examine the elements of the commercial bribery claim to determine whether or not they present a clear conflict with the regulatory scheme. The elements are relatively simple. The following paragraphs in the *Pfeiffer* Complaint assert all the elements:

- *Payment of a bribe across the buyer-seller line.* In paragraphs 109-15, the *Pfeiffer* Complaint explains that, when the investor Petitioners sold their securities, they collected profits that they split with the investment banking Petitioners by making large purchases and sales of unrelated securities and paying unusually large commissions. J.A. 58-59, ¶¶ 109-15.

- *Fiduciary relationship.* In paragraphs 72 and 73 of his Complaint, Pfeiffer alleges that the retail customers of the investment banking Petitioners reposed their trust in the investment banking Petitioners, and that is the basis for the Petitioners' fiduciary responsibility to their retail customers. J.A. 53-54, ¶¶ 72-73.

- *Receipt of personal benefit.* Pfeiffer alleges that the investment banking Petitioners received a personal benefit because they received rebates

from the excessive commissions the investor Petitioners paid them. J.A. 59, ¶¶ 113-15.

- *Secrecy of the bribery payment.* Pfeiffer alleges that the retail customers were unaware that their fiduciaries, the investment banking Petitioners, were receiving (or alternatively paying) bribes. J.A. 55, 59, 60, ¶¶ 83, 107-15, 121.

To assert the claim without the background, motive, and means paragraphs misused by the district judge as a basis for finding an intrusion on the regulatory scheme, only paragraphs 59, 72, 73, 83, 107-15, and 121 of the *Pfeiffer* Complaint are necessary to make a "plain, concise statement of the claim for relief." Hence, the allegations necessary for a Robinson-Patman Act violation do not involve the securities laws. The payment of a bribe across the buyer-seller line, the fiduciary relationship between retail customer and the investment banker/broker-dealer, the receipt of a benefit by the bribed party, and the secrecy of the bribe are not conduct that the SEC regulates under the federal securities laws; nor do they intrude on a pervasive regulatory scheme for IPOs. The SEC does not have the regulatory power to permit secret bribes across the buyer-seller line to a fiduciary.

The *Pfeiffer* Complaint includes non-essential allegations which supply historical background (J.A. 51-73, ¶¶ 48-71), theory (J.A. 54-75, ¶¶ 75-80), mechanisms for profits (J.A. 55-58, 60, ¶¶ 81, 82, 84-87, 91-108, 118), and the purpose of the bribe ("in exchange for favored allocations of IPO securities" (*see* J.A. 44, 54, 55, 59, ¶¶ 2, 75, 84-85, 116).) Petitioners seize upon these paragraphs to mischaracterize them as challenges to the IPO allocation process. The purpose of the bribe (for additional allocations or for performance of the aftermarket

manipulation techniques) (*see* J.A. 46-58, ¶¶ 81-82, 90-106) is immaterial to the sufficiency of the pleadings. Pfeiffer need not allege the purpose of the bribe to survive a motion to dismiss, and if those allegations are excised from the *Pfeiffer* Complaint, the Robinson-Patman Act claim still stands.

Assuming that Petitioners' manipulation of the aftermarket (conduct that establishes motive and method but is not essential to Pfeiffer's claim) requires an implied immunity analysis, a finding of implied immunity is not proper because manipulation is prohibited by statute. A finding that Petitioners' manipulation violated the antitrust laws would not conflict with securities regulation.

In short, the elements of a commercial bribery claim do not conflict with the securities laws, and the securities laws do not regulate the secret payment of a bribe across the buyer-seller line. *See, generally, Harris*, 940 F.2d at 1274; *Stephen Jay Photography*, 903 F.2d at 993; *Grace*, 538 F.2d at 173. Because the conduct induced by the bribe (tie-ins, laddering transactions, timed purchases, and false analysts' reports) manipulated the market prices of securities, this Court must determine whether this creates a potential conflict between the securities laws and the antitrust laws. Since the antitrust laws prohibit commercial bribery and the securities laws prohibit manipulation, the conduct at issue is unlawful under both the securities laws and the antitrust laws; and no "potential conflict" arises.

POINT III

THE FALSE ANALYSTS' REPORTS, PREARRANGED PURCHASES (TIE-INS AND LADDERING), AND SPLITTING OF COMMISSIONS DO NOT FORM ELEMENTS OF A COMMERCIAL BRIBERY CLAIM AND SHOW NO POTENTIAL SPECIFIC CONFLICT WITH THE IPO MARKET

As alleged in the Complaint, Petitioners designed their commercial bribery scheme to manipulate the price of certain securities by the issuance of false analyst reports and by directed purchases. J.A. 53-56, ¶¶ 84-89, 91-106. False analyst reports violate section 9(a)(4) of the Exchange Act and directed purchases violate section 9(a)(2) of the Exchange Act. If they are deemed to be "inextricably intertwined" with the IPO aftermarket, Petitioners will not benefit from this argument because they will be engaged in unlawful conduct.

Sections 9(a)(2) and (4), mandatory statutory provisions, contain no clauses authorizing the SEC to regulate by rule, interpretation, modification, or adaptation. The lack of reference to the SEC in these provisions contrasts sharply with, among others, section 9(a)(6) and section 10(b) of the Exchange Act. Congress explicitly gave the SEC the power to adopt rules, regulations, or interpretations under both these statutes. Under those provisions, Congress required the SEC to prevent manipulation in whatever form it might take. It did not, as Petitioners imply, authorize the SEC to permit manipulation. Sections 9(a)(2) and 9(a)(4) establish a statutory floor below which covered conduct always violates the statute.

Petitioners cannot point to any statutory or regulatory authority, legislative history, or past regulatory activity in which the SEC permits, has permitted, or has the

authority to permit the manipulation of stock prices in the aftermarket in violation of sections 9(a)(2) and (4). In the past, Petitioners have suggested that section 19(a) of the Securities Act provides the SEC with the "authority . . . to make, amend, and rescind *such rules and regulations* as may be necessary . . ." 15 U.S.C. § 77s(a) (emphasis added). The fact that the SEC is free to retract or expand its "rules and regulations" is not surprising, but the provision does not give the SEC authority to make, amend, or rescind the statutory provisions of the Securities Act or the Securities Exchange Act.

As usual, Petitioners have gone too far with their argument. According to the District Court, whose determinations and whose approach to the case have been adopted here by the Petitioners, any contact by the SEC or a self regulatory organization with a particular practice or provision of the securities laws makes it automatically immune from the antitrust laws. *See, e.g.*, Pet'rs Br. 3-15.

Transactions involving large amounts of stock in the IPO aftermarket but no investment purpose are manipulative devices intended to create a false impression of interest in the stock. The legislative history of the Exchange Act makes it abundantly clear that manipulation is *per se* unlawful while stabilization is subject to SEC regulation. The House Report introducing the Exchange Act states:

> But wash sales and matched orders *and other devices designed to create a misleading appearance of activity* with a view to enticing the unwary into the market on the hope of quick gains *are definitely prohibited. False and misleading statements* designed to induce investors to buy when they should sell and to sell when they should buy *are also outlawed and penalized.*

* * * *

> The evidence as to the value of *pegging and stabilizing* operations, particularly in relation to new issues, is far from conclusive. While abuses are undoubtedly associated with such manipulation, *because of the desire of the Committee to proceed cautiously such operations have not been forbidden altogether, but have been subjected to control as the administrative commission may find necessary* . . . .

(H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10-11 (1934), reprinted in 5 J. S. Ellenberger & E. P. Mahar, Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934, Item 18 (1973).)

Congress declared manipulation of aftermarket trading of securities unlawful by adopting sections 9(a)(2), 9(a)(4), and 17(a) of the Securities Act. As the language of these provisions makes clear, Congress passed them to prohibit aftermarket manipulation, not to regulate it, or to grant rule making power over it. Sections 9(a)(2), 9(a)(4), and 17(a) declare manipulation *per se* unlawful and are not subject to delicate construction or interpretation by the SEC. The SEC cannot promulgate rules or regulations that would countenance manipulation of the aftermarket when Congressional statutes outlaw it. In its landmark opinion in *Ernst & Ernst v. Hochfelder*, this Court said:

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.

425 U.S. 185, 213-14 (1976) (internal citations omitted). *See also Federal Election Comm'n v. Democratic Sen-*

atorial Campaign Comm., 454 U.S. 27, 32 (1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 936 (2d Cir. 1986); *Hayfield N. R.R. Co. v. Chicago & North Western Transp. Co.*, 467 U.S. 622, 634 (1984). Since manipulation of the aftermarket is *per se* illegal under the securities statutes, the SEC can never permit aftermarket manipulation. Pfeiffer's antitrust claim meshes neatly with the securities laws without actual or potential sparks, collisions, "repugnancy," or conflict. *Gordon*, 422 U.S. at 689-90; *NASD*, 422 U.S. at 730-34; *Strobl*, 768 F.2d at 27 (2d Cir. 1985).[5]

Respondents challenge the Petitioners' "right" to manipulate the price of hot issue securities through the use of false statements by analysts, tie-in arrangements, directed purchases, and laddering agreements. This conduct is prohibited by sections 9(a)(2), 9(a)(4) and 17 of the Securities Act. Congress enacted these provisions to prevent manipulation and ensure a fair, unrigged market. Review of Antimanipulation Regulation of Securities Offerings, 56 S.E.C. Docket 1302, 1994 WL 138672, *25-26 (April 19, 2004); *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 794 (2d Cir. 1969) (purpose of

[5] While the SEC actively regulates underwriter compensation, Respondent does not challenge the amount of the commissions that the investment banking Petitioners received. The compensation the investment banking Petitioners received in their capacity as broker for transactions not involving hot issue securities is challenged only as an undisclosed bribe received as payment for the manipulation of the market at the expense of retail customers. Holding the Petitioners' conduct illegal under the antitrust laws would not conflict with or restrict the SEC's ability to: (1) define what constitutes underwriter compensation; (2) set limits on the amount of compensation an underwriter may receive; or (3) devise terms and arrangements for interstate public offerings to the SEC. The application of the Robinson-Patman Act to prevent the bribery of brokerage firms would in no way inhibit the SEC's ability to revise, rewrite, create, expand, or retract its rulings and regulations on underwriter or brokerage compensation.

section 9(a)(2) is to outlaw every device "used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage."); *see also* SEC Report on Proposals for Amendments of the Securities Act of 1933 and the Securities Exchange Act of 1934, H.R. Comm. Print, 77th Cong., 1st Sess. 50 (1941); 3 Loss, Securities Regulation 1549-55 (2d ed. 1961); *Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 361 (2d Cir. 1990) (section 9(a)(4) prohibits misrepresentations in manipulative schemes); *Panfil v. ACC Corp.*, 768 F.Supp. 54, 59 (W.D.N.Y. 1991), *aff'd*, 952 F.2d 394 (2d Cir. 1991); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10-11 (1934), reprinted in 5 J. S. Ellenberger & E. P. Mahar, Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934, Item 18 (1973); S. Rep. No. 792, 73d Cong., 2d Sess. (1934), reprinted in 5 J.S. Ellenberger & E.P. Mahar, Legislative History, Item 17); *United States v. Naftalin*, 441 U.S. 768, 777 (1979) (section 17(a) "was intended to cover any fraudulent scheme in an offer or sale of securities whether in the course of an initial distribution or in the course of ordinary market trading."); *see also United States v. Brown*, 555 F.2d 336, 338-39 (2d Cir. 1977). *Securities and Exch. Comm'n v. Sayegh*, 906 F.Supp. 939, 946 (S.D.N.Y. 1995); *In re Michael Batterman*, 46 S.E.C. 304, 305 (Nov. 2, 1976);[6] *Securities and Exch. Comm'n v. Halsey, Stuart & Co.*, 30 S.E.C. 106, 112 (1949), *aff'd sub. nom., Securities and Exch. Comm'n v. Militano*, 101 F.3d 685, 1996 WL 282013 (2d Cir. 1996).

Tie-in arrangements, now and historically, violate section 17(a) of the Securities Act and 10(b) of the Exchange Act. *In re Richard D. DeMaio*, Release No.

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[6] Pfeiffer does not dispute that the SEC enforces the securities laws. The SEC's decisions cited here demonstrate its enforcement of the securities laws, not its ability to regulate *per se* unlawful conduct.

ID-37, 54 S.E.C. Docket No. 1509, 1993 WL 300297 (Aug. 4, 1993); *In re R. L. Emacio & Co.*, Release No. 34-4880, 35 S.E.C. 191, 1953 WL 44107 (June 16, 1953); *Securities and Exch. Comm'n v. Wexler*, Release No. 13225, 51 S.E.C. Dkt No. 516, 1992 WL 87808 (Apr. 22, 1992) (violation of sections 5(a) and 17(a) of the Securities Act and sections 10(b) and 15(c) of the Exchange Act); *In re Stuart James Co. Inc.*, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85129 at 84,089 (Mar. 17, 1993); *In re Victor Goldman*, Release No. 34-31210, 52 S.E.C. Docket 1551, 1992 WL 252182 (Sept. 22, 1992).

Pre-arranged, directed purchases, or directing the trading in a security is a violation of section 17(a) of the Securities Act and 10(b) of the Exchange Act when the trading falsely suggests to the public that the activity is "the reflection of a genuine demand instead of a mirage." *Securities and Exch. Comm'n v. Kimmes*, 799 F.Supp. 852, 859 (N.D. Ill. 1992), *aff'd sub nom., Securities and Exch. Comm'n v. Quinn*, 997 F.2d 287 (7th Cir. 1993); *United States v. Cohen*, 518 F.2d 727, 734 (2d Cir. 1975); *United States v. Corr*, 543 F.2d 1042, 1045-46 (2d Cir. 1976); *Securities and Exch. Comm'n v. Allison*, Case No. 81-435 (BE), 1982 WL 1560, at *7 (D. Or. Jan. 17, 1982); *In re C. James Padgett*, Release No. 38423, 64 S.E.C. Docket 272, 1997 WL 126716 (March 20, 1997); *Securities and Exch. Comm'n v. Wexler*, Release No. 14489 (Sept. 21, 1995); S.E.C. Release No. 26182 (October 14, 1998), 53 FR 41206.

Laddering also has been expressly declared a violation of the securities laws. *In re Barrett & Co.*, Release No. 2901, 9 S.E.C. 319, 328 (May 22, 1941) (violation of section 9(a)(2) of the Exchange Act); *In re Halsey Stuart & Co.*, Release No. 34-4310, 30 S.E.C. 106, *3,1949 WL 36458 (Sept. 21, 1949); *Securities and Exch.*

Comm'n v. Resch-Cassin & Co., 362 F.Supp. 964, 976-77 (S.D.N.Y. 1973); *In re Charles C. Wright*, Release No. __, 3 S.E.C. 190, 1938 WL 34042 (Feb. 28, 1938), *rev'd and remanded on other grounds*, 112 F.2d 89 (2d Cir. 1940); *In re GOB Shops of America, Inc.*, Release No. 33-4075, 39 S.E.C. 92, 1959 WL 59435 (May 6, 1959); *In re Bruns, Nordeman & Co.*, Release No. 34-6540, 40 S.E.C. 652 (April 26, 1961) (violation of section 17(a) of the Securities Act and sections 10(b) and 15(c) of the Exchange Act.); *see also* Sen. Rep. No. 792, 73rd Cong., 2d Sess., pp. 7-9.

The analysts' recommendations, made directly and indirectly to the class members, were fraudulent and violated long-standing, uniform, judicial applications of section 10(b) because they had no justifiable basis. *In re IBM Corp. Sec. Litig.*, 163 F.3d 102, 107 (2d Cir. 1998) (statements regarding projections of future performance are actionable "if the speaker does not genuinely or reasonably believe them"); *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 266 (2d Cir. 1993); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1093 (1991) (opinions such as "fair" and "high" must have a factual basis that justifies them as accurate, and if they have no factual basis, the statements are misleading).

Since Pfeiffer challenges conduct that is *per se* unlawful under federal statutes, the SEC is not, contrary to the District Court's decision, "empowered to regulate the conduct [challenged by Pfeiffer]." *In re Initial Pub. Offering Antitrust Litig.*, 287 F.Supp.2d at 507.

POINT IV

DEFENDANTS ENGAGED IN PRICE MANIPULATION, NOT PRICE STABILIZATION

Section 9(a)(6) gives the SEC broad authority to regulate aftermarket price stabilization, specifically authorizing the "pegging, fixing, or stabilizing of price of such security." In this case, like the authority on the amount of commissions, it has become a logical absurdity. How far into the aftermarket does the period of stabilization extend, six months, nine months, two years? To the end of the period any Petitioner's transactions need to be covered? The same rule applies to the amount of the commission. The amount necessary to meet projected profits for the year? Is a proper commission the amount necessary to pay the investment banking firm the bribe due him in the available time? If the ordinary commission were $.05 per share but the customer paid $1.00 per share, that would be twenty times the ordinary amount on the transaction. Is that within the discretion to set negotiated rates? These abuses of the SEC's discretionary rulemaking powers suggest that this basis for immunity, i.e., conduct is immune if it can be compelled by the SEC or if the Commission can allow it, for example, allow the investment banking firms to violate the law with impunity under a claim of immunity. These determinations cannot be put in the hands of the SEC or the broker under a theory of self-regulation.

When it considered the SEC's ability to permit aftermarket stabilization, the District Court used it as an excuse for not thinking and not recognizing an obvious basis for rejecting immunity:

> Whether actions such as the "laddering" or "tie-in" arrangements alleged by the Sherman Act Plaintiffs are permissible aftermarket stabilization practices is

> not for this Court to determine. It is enough that the Commission is granted the authority to make that determination.

In re Initial Pub. Offering Antitrust Litig., 287 F.Supp.2d at 513.

The District Court determined that the Exchange Act impliedly repealed the antitrust laws because it "grants the Commission sweeping authority to define and prohibit manipulative practices in connection with securities offerings." *Id.* The District Court also relied on 17 C.F.R. § 242.100-05 ("Reg. M") and the Division of Market Regulation Staff Legal Bulletin No. 10, Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases (Aug. 25, 2000) (hereinafter "Bulletin No. 10."). *Id.*, 287 F.Supp.2d at 514-15. Neither Reg. M nor Bulletin No. 10 can compel manipulation or allow it, i.e., repeal the antitrust laws as applied to the aftermarket manipulation alleged in the *Pfeiffer* Complaint. Reg. M specifically states in its preface that it does not govern price manipulation:

> Any transaction or series of transactions, whether or not effected pursuant to the provisions of Regulation M, *remain subject to the antifraud and anti-manipulation provisions of the securities laws*, including, without limitation, Section 17(a) of the Securities Act of 1933 [15 U.S.C. [§] 77q(a)] and Sections 9, 10(b) and 15(c) of the Securities Exchange Act of 1934 [15 U.S.C. [§§] 78i, 78j(b), and 78o(c)].

17 C.F.R. § 242.100(a) (emphasis added). Similarly, Bulletin No. 10 reminds underwriters that tie-in arrangements and laddering:

> may violate the anti-manipulation provision of the Exchange Act, particularly Rule 10b-6 (which was

> replaced by Rules 101 and 102 of Regulation M) under the Exchange Act, and may violate other provisions of the federal securities laws.

Neither Reg. M nor Bulletin No. 10 support the District Court's determination that the SEC can authorize or direct market manipulation. The fact that the SEC is free to add a layer of regulation atop the securities laws prohibiting an activity already declared unlawful by Congress does not create a potential for conflict between the securities laws and the antitrust laws or interfere with a pervasive regulatory scheme.

This Court need not look at SEC rules and regulations to determine whether laddering and tie-in arrangements are permissible stabilization activities. Tie-in agreements and laddering designed to manipulate the price of a security upward are *per se* unlawful under the securities statutes.

Price stabilization is not the same as market manipulation. *See* 17 C.F.R. § 242-100(b) ("*Stabilize* or *stabilizing* means the placing of any bid, or the effecting of any purchase, for the purpose of pegging, fixing, or maintaining the price of a security."); *Stella v. Kaiser*, 82 F.Supp. 301, 308-10 (S.D.N.Y. 1948) (distinguishing between stabilization, which the SEC has jurisdiction to regulate, and manipulation, which is *per se* unlawful); *United States v. Stein*, 456 F.2d 844, 850 (2d Cir. 1972) ("proof of 'creating actual or apparent active trading in' and of 'raising or depressing the price of' " a security is manipulation, not stabilization). According to the *Pfeiffer* Complaint, the truth of which is assumed for the purposes of a motion to dismiss, the Petitioners were not engaged in stabilization because they intended to, and succeeded in, artificially inflating the share price of the hot issue securities, often more than 300% to 400% higher than the initial offering price.

The Petitioners' manipulation cannot be justified under the guise of price stabilization. *Securities and Exch. Comm'n v. Torr*, 22 F.Supp. 602, 608 (S.D.N.Y. 1938) (holding that directed purchases violated section 9(a)(2) and were not stabilization activities regulated by the SEC). As the SEC said in *In re Michael J. Meehan*, Release No. __, 2 S.E.C. 588, 1937 WL 32921 (July 31, 1937):

> It is true that Congress in Section 9(a)(6) permits, subject to such restrictions as the Commission may impose, transactions whose purpose is to peg, fix or stabilize the price of a security. On the propriety generally of pegging, fixing and stabilizing transactions we need not here express a view. But to extend the statutory concept of pegging, fixing and stabilizing, to permit transactions designed to maintain a price that already had been artificially raised, would be to neglect the obvious purpose and intent that underlay Section 9(a)(6) and to make its provisions a means for avoiding the prohibitions of Section 9(a)(2). Instead, such pretended pegging, fixing and stabilizing operations, in order to be properly understood, must be projected on the background of which they are an intrinsic part, and that background is the earlier design of manipulation.

United States v. Brown, 5 F.Supp. 81 (S.D.N.Y. 1933), *aff'd*, 79 F.2d 321 (2d Cir. 1935), *cert. denied*, 296 U.S. 250; *Harper v. Crenshaw*, 82 F.2d 845 (D.C. App. 1936), *cert. denied*, 298 U.S. 685; *In re R. L. Emacio & Co.*, Release No. 34-4880, 35 S.E.C. 191, 1953 WL 44107 (June 16, 1953).

The SEC's jurisdiction and power are limited to its Congressional mandate; and it cannot, even if it desires to, promulgate rules or declare market manipulation lawful when it is *per se* illegal under the securities laws.

Federal Election Comm'n, 454 U.S. at 32; *Bobker*, 808 F.2d at 936; *Hochfelder*, 425 U.S. at 213-14. Congress made market manipulation *per se* unlawful by adopting sections 9(a)(2), 9(a)(4), and 17(a) of the Securities Act. Congress enacted these provisions explicitly to prohibit aftermarket manipulation, and they are not subject to the SEC's qualification or interpretation. *Id.* At the same time that it designed sections 9(a)(2) and (4), statutes without discretion, Congress carefully crafted section 9(a)(6) of the Exchange Act to allow the SEC the necessary discretion to permit or prohibit conduct that could be essential to the capital raising needs of a free market. *See e.g.*, section 9(a)(6) of the Exchange Act; H.R. Rep. No. 73-1383, at 6-7 (1934); S. Rep. No. 73-792, at 5 (1934). In section 9(a)(6), Congress granted the SEC broad discretion to create, modify, limit, or expand the methods and forms of permissible stabilization. *See id.* Unlike manipulation, Congress specifically decided not to prohibit stabilization activities and left it to the SEC to prescribe appropriate rules and regulations. *United States v. Morgan*, 118 F.Supp. 621, 695 (S.D.N.Y. 1953); S. Committee Rep., No. 792, 73d Cong., 2d Sess., pp. 8-9 (April 17, 1934).

POINT V

PETITIONERS' ARGUMENTS HAVE NO MERIT

Arguing in favor of the broadest possible immunity for anything that involves or relates to a public offering (Pet'rs Br. 25-31), Petitioners, contrary to the brief of the United States (United States' Amicus Br. 16-23) and the existing case law (*see, generally, National Gerimed.*, 425 U.S. at 392), claim the equivalent of an express repeal or blanket immunity for the IPO market. If Petitioners succeed in establishing their catch-all definition

of implied repeal they would be able to find implied immunity for everything even remotely touching the securities laws, regardless of whether any potential conflict exists. This has never been the intent of Congress or this Court. United States' Amicus Br. 10, 16-23.

In determining the pervasiveness of the "regulatory" scheme, Petitioners continually confuse regulatory provisions and regulatory power with enforcement provisions and enforcement power. Working with a regulatory provision, the SEC can change the manner in which it is construed as it did with the fixed commission provisions. *See Gordon*, 422 U.S. at 668-82. An enforcement provision provides no such flexibility or expansiveness.

From a policy viewpoint, the approach suggested by the Solicitor General's brief, allowing unlawful transactions "inextricably intertwined" with lawful activities is a bad idea. Looking for cover for a new, imaginative plan of wrongdoing in the next hot issue IPO market, Petitioners will find easy protection for their next unlawful scheme. Pet. App. 13a-14a, 15a.

Petitioners' attitude toward this appeal, their conduct that lead to the filing of hundreds of lawsuits, and their realization of hundreds of millions, if not billions, of dollars in unlawful profits is simple. They wish to keep everything, suffer no penalty, and leave the law in a state that imposes no risks to them for similar misconduct in the future. The manner in which they treat the law makes this clear. Petitioners make the same erroneous argument adopted by the District Court: they treat everything having to do with the IPO process as if it were sacred and covered by a pervasive system of regulation, an argument rejected by the Court of Appeals and by the Solicitor General in his amicus brief. United States' Amicus Br. 10.

To find immunity a party must make a specific factual inquiry into the allegations necessary for a Robinson-Patman Act commercial bribery claim. *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 799 (2d Cir. 2002); *Northeastern Tel. Co. v. American Tel. and Tel. Co.*, 651 F.2d 76, 83 (2d Cir. 1981). Petitioners have made no effort to identify regulatory action that would conflict with any element of a claim for commercial bribery under the Robinson-Patman Act. They merely rail against the possibility that an antitrust suit could proceed on the basis of their bad conduct in a public offering.

Petitioners argue that "by requiring an overt statement of legislative intent on the very conduct at issue" the Second Circuit has reduced "the implied immunity doctrine to a dead letter." Pet's Pet. Cert. 13. This Court has long required the "potential specific conflict" to be "clear" or the intent to be "clear." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("The intention of the legislature to repeal 'must be *clear* and manifest.' " (quoting *Red Rock v. Henry*, 106 U.S. 596, 601, 602 (1883)(emphasis supplied)); *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973); *National Gerimedical Hosp. & Gerentology Ctr. v. Blue Cross*, 452 U.S. 378, 389 (1980) ("this intent [to repeal] must be clear"); *NASD*, 422 U.S. at 719-20; *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682 (1975); *Pasadas v. National City Bank*, 296 U.S. 497, 503 (1936); *Borden*, 308 U.S. at 198; *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). The criteria listed by the Second Circuit (Cert. Pet. 33a-34a, 57a.), are not as rigid as Petitioners contend; all require or permit qualitative assessment, not rigid assertion.

An implied repeal most often rests on a determination that the SEC may allow the conduct that is prohibited by plaintiff's antitrust claim. *See In re Stock Exch. Options Trading Antitrust Litig.*, 317 F.3d 134, 149 (2d Cir. 2003); *Friedman*, 313 F.3d at 800-01; *In re Public Offering Fee Antitrust Litig.*, No. 98 Civ. 7890, 2003 WL 21496795 at *2 (S.D.N.Y. June 27, 2003). Petitioners have made no effort to show that this standard immunity provision can be met here. In fact, they cannot meet it. As we show in our memorandum, the conduct at issue here is unlawful by statute and may not be made lawful by rule, regulation, interpretation, or otherwise. Petitioners have ignored this long-standing principle.

A complex regulatory scheme and a finding under the regulatory statute that a particular transaction was "in the public interest" or served competition has not always been a basis for finding immunity or for precluding the application of the antitrust laws to the transaction. *See Otter Tail*, 410 U.S. at 372-73; *Philadelphia Nat'l Bank*, 374 U.S. at 351-52; *California v. Federal Power Comm'n*, 369 U.S. 482, 488-89 (1962); *United States v. Radio Corp. of America*, 358 U.S. 334, 346-52 (1959); *Silver v. New York Stock Exch.*, 373 U.S. at 360-63 (1963).Petitioners treat treble damage antitrust suits as if they were, at minimum, the handy work of the devil. *Id.* at 3, 4. Nevertheless, Petitioners note the hopeless inability of the SEC to deal with "tie-in" transactions and "laddering" transactions in the hot issue IPO markets in 1963, 1984, and 1999. Pet'rs Br. 12-13. Having shown a high degree of recidivism in the misconduct that characterized their actions in this hot issue IPO market, Petitioners have demonstrated that they deserve and that the IPO markets in the United States would benefit from the availability of treble damage suits.

Repeal of the antitrust laws should be implied only when necessary to make the securities laws work and "even then only to the minimum extent necessary." *National Gerimedical*, 452 U.S. at 388; *Silver*, 373 U.S. at 357; *Strobl*, 768 F.2d at 26. The Court's analysis "must focus on the 'potential' for '*conflicts* between the antitrust laws and a[n authorized] regulatory scheme.' " *Stock Exchs. Options*, 317 F.3d at 148 (emphasis and alteration in original); *Strobl*, 768 F.2d at 27. Petitioners violated both the securities laws and the Robinson-Patman Act with equal malfeasance. Because the conduct at issue is impermissible under both, the application of the antitrust laws does not conflict with the securities laws, and it does not interfere with any regulatory scheme, i.e., the SEC could never create a regulatory framework or engage in rule making that would allow Petitioners' conduct.

In the mountain of papers submitted in support of the petition for certiorari by interested organizations, numerous parties complained that the decision of the Second Circuit was incomprehensible and would be impossible to apply to day to day life. Cert. Pet. 19. If anything, the decision by the Court of Appeals clarified the confused and confusing law in the area of antitrust immunity and the national securities markets' regulatory scheme more than any other decision by any other court. The best response to the argument of confusion and incomprehensibility is, "Hire better lawyers."

CONCLUSION

As we have shown in this brief, the substantive elements of a claim of commercial bribery that violates the Robinson-Patman Act, § 13(c), do not intrude on the regulatory scheme of the federal securities laws for either the national securities markets as a whole or the IPO market, nor do they present a "potential conflict." Therefore, we respectfully request that the Court affirm the decision of the United States Court of Appeals for the Second Circuit and remand the case for further proceedings consistent with its opinion. Should the Court feel that any of the allegations contained in the *Pfeiffer* Complaint, e.g., allocations of large blocks in IPOs, tie-ins or laddering in the aftermarket, use of excessive commissions to divide profits, somehow are indispensable to a commercial bribery claim and intrude on the national securities markets or on the regulatory scheme that governs them, we respectfully request that the Court remand with leave to cure those defects by service of an amended complaint.

Respectfully submitted,

RUSSEL H. BEATIE
BEATIE AND OSBORN LLP
521 Fifth Avenue, 34th Floor
New York, New York 10175
(212) 888-9000

Attorneys for Respondent
Milton Pfeiffer

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